



To: Executive Committee, Multistate Tax Commission

From: Wood Miller, Uniformity Committee Chair
Richard Cram, Co-Vice Chair
Chris Coffman, Co-Vice Chair

Re: Uniformity Committee Report to the Executive Committee

Date: December 11, 2015

The commission develops model state tax laws for states to consider adopting. Proposed model laws may be suggested by our executive committee, a standing committee, one or more states, a taxpayer or taxpayer group, or any other member of the public. Once the committee has identified a model to develop, initial drafting takes place in workgroups.

Richard Cram, Kansas Department of Revenue, chairs the workgroup which has developed a model sales and use tax nexus statute. Mr. Cram also chairs a membership/industry workgroup which has been looking at a possible whistleblower model. Jennifer Hays, Kentucky Legislative Research Commission, chairs a workgroup drafting model Article IV (UDITPA) Section 1 “receipts” regulations. Michael Fatale, Massachusetts Department of Revenue, chairs a workgroup drafting model Article IV (UDITPA) Section 17 market sourcing regulations. All meetings and calls of the workgroups are public and public participation is encouraged.

Through November 30, 2015, the committee met once in person — in July 2015 in Spokane, WA. The workgroups have met regularly by telephone. Chris Coffman, Washington Department of Revenue, has taken the Co-Vice Chair position vacated by Robynn Wilson, Alaska Department of Revenue. The Uniformity Committee has, in recent years, been divided into two subcommittees—the Sales and Use Tax Subcommittee and the Income and Franchise Tax Subcommittee. We are no longer holding separate meetings of these subcommittees, in an effort to streamline meetings and work of the Uniformity Committee. Instead, we will segment the committee’s agenda when necessary between income tax issues and sales and use tax issues.

Projects by Status

Currently before the Executive Committee:

- Model Sales and Use Tax Nexus (Engaging in Business) Statute (Report of the Hearing Officer)
- Model Sales and Use Tax Notice and Reporting Statute (tabled)

Under development or consideration at the Uniformity Committee:

- UDITPA Sec. 1 “Receipts” Model Regulations
- UDITPA Sec. 17 Market Sourcing Model Regulations
- Model Whistleblower Statute

Project Proposals:

- Possible Project on Federal Adjustments
- Possible Project on Partnership Issues

Project Summaries

Before the Executive Committee

- Model Sales and Use Tax Nexus (Engaging in Business) Statute (Report of the Hearing Officer)

This model was approved by the Executive Committee in July 2015 for public hearing pursuant to Compact Art. VII and Bylaw 7. After giving 30-days notice, a public hearing was held by the staff of the Commission and the Hearing Officer's Report is being provided today for the committee's consideration.

Richard Cram, Kansas Department of Revenue, chairs the workgroup that drafted the model statute. A first draft of a proposed New York style "associate nexus" statute was presented during the Uniformity Committee teleconference in October, 2011. That draft largely followed so-called "Amazon" legislation first adopted in New York. A second draft was prepared for the July 2012 meeting that also largely followed the New York legislation and included aspects of the similar legislation adopted by California. The subcommittee has benefited considerably from comments and input by representatives from New York and California.

The subcommittee held a teleconference in October, 2012 which resulted in a third draft incorporating elements of the MTC affiliate nexus statute (which the Commission failed to adopt). This draft was reviewed and discussed during the December 2012 meeting. During that meeting, the subcommittee voted to expand the project to create a model sales and use tax remote seller nexus statute. A workgroup was formed that reviewed nexus research, developed a policy checklist, and identified state legislation that could serve as a template for the model. The workgroup met several times in 2013.

At the subcommittee's meetings in March, July and December 2013, the subcommittee reviewed the drafts prepared by the workgroup and returned them with suggested amendments. At its March, 2014 meeting, the subcommittee reviewed the draft prepared by the workgroup, but raised concerns that some of the provisions applied to more than just remote sellers. The subcommittee sent it back to the workgroup for further revisions.

A draft prepared by the workgroup and approved by the subcommittee was presented to the Uniformity Committee at its meeting July 2014. Additional changes were recommended regarding the model statute, which was returned to the workgroup. The workgroup presented its revised model to the subcommittee at the December 2014 meeting. At the December 2014 and March 2015 meetings, the Committee made additional changes and also sent the draft back to the workgroup. The workgroup has held additional phone calls refining the provisions and responding to the Committee's suggestions. The model was again before the Uniformity Committee at its meeting on July 28, 2015. It was approved and sent to the Executive Committee at its meeting July 29, 2015 and there was approved for public hearing.

- Model Sales and Use Tax Notice and Reporting Statute (tabled).

This project is on hold pending the constitutional challenge to the Colorado use tax information reporting statute. At its March, 2010 meetings, the sales and use tax subcommittee initiated two projects related to sales and use tax education and enforcement: (1) a sales and use tax notice and reporting model, and (2) an associate nexus model (the associate nexus model is discussed below). The subcommittee determined it would work first on the sales and use tax notice and reporting model.

The resulting proposal requires sellers who are not collecting sales or use tax to notify purchasers of a potential tax liability at the time of sale if the product is to be delivered into the state. Sellers are also required to make annual reports to each such purchaser and an annual report to the

state. De minimis exceptions and penalties are provided. The Uniformity Committee approved a draft in early March, 2011. Later that month, the executive committee approved the draft for public hearing. The hearing was held, and the hearing officer's report and recommendations were presented to the executive committee, which recommended approval of the proposal to the commission. The proposal was not placed on the commission's agenda, however, because it had not passed the bylaw 7 survey at that point. The proposal came back before the executive committee in December, 2011, and clarifications were requested. The Uniformity Committee made those clarifications and the executive committee took the matter up again in May, 2012.

During that meeting, the executive committee voted to retain the proposal pending further discussion after the U.S. Court of Appeals for the 10th Circuit issued its opinion in *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2013), and held that the federal Tax Injunction Act barred the Court from hearing the case. DMA filed a petition for certiorari in the U.S. Supreme Court on March 5, 2014. DMA also filed a separate action in the District Court for the City and County of Denver, which essentially tracks the issues in the federal action. On February 18, 2014, the state district court granted DMA's motion for preliminary injunction, staying the enforcement of the statute pending trial. The U.S. Supreme Court granted the petition for certiorari July 1, 2014 and rendered its decision on April 6, 2015, finding that the Tax Injunction Act did not bar the 10th Circuit from hearing the case. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015). The case was remanded for further proceedings and is now pending in the 10th Circuit after extensive supplemental briefing on the merits and a second oral argument.

Under Development or Consideration at the Uniformity Committee

- UDITPA Sec. 1 Workgroup – “Receipts”

Work on regulations to implement changes to Sec. 1(g) of Art. IV of the model Compact was begun November 6, 2014 and is continuing. Jennifer Hays, Kentucky, chairs the group. The workgroup consists of Donnita Wald, North Dakota; Steve Wynn, Idaho; Nathan Nielson, Idaho; Joseph DiNicola, Oregon; and Scott Fryer, Arkansas. Others have also participated in the workgroup. The workgroup has been meeting weekly via teleconference and had presented its recommended draft to the Uniformity Committee. (See also the Note under the UDITPA Sec. 17 Workgroup below.)

- UDITPA Sec. 17 Workgroup – Model Market-Sourcing Regulations

Work on regulations to implement changes to Sec. 17 of Art. IV of the model Compact was begun November 5, 2014 and is continuing. Michael Fatale, Massachusetts, chairs the group. The workgroup consists of Chris Coffman, Washington; Phil Skinner, Idaho; Aishah Hashmi, District of Columbia; Jeffrey Henderson, Oregon; Holly Coon, Alabama; Nirmail Dhaliwal, District of Columbia, and Ben Miller. Others have participated in the workgroup meetings. The workgroup has been meeting weekly via teleconference and had presented its recommended draft to the Uniformity Committee.

NOTE: The drafts being prepared by both the Sec. 1 and Sec. 17 workgroups are amendments to the existing MTC model allocation and apportionment regulations. Once the Uniformity Committee has finished these drafts and is ready to refer them to the Executive Committee for consideration, the drafts will be incorporated into a single revised version of the regulations.

- Model Whistleblower Statute

This project began as an extension of the Model Provisions Concerning Class Actions and False Claims. The False Claims model was originally requested by the telecommunications industry. Industry representatives gave a presentation in July 2012 on issues arising from class actions for alleged over-

collection of tax from communications customers. In December, 2012, after hearing input from COST and others, the project was expanded to include all industries, not just communications, and to include a look at false claims acts actions for alleged under-collection of tax. The subcommittee met with the litigation committee in February, 2013, to review a class action model recommended by the American Bar Association. In March, 2013, the subcommittee directed staff to provide an overview of state laws on class action and false claims acts in the state tax context. That research was reviewed by the subcommittee at its July 2013 meeting. An industry-state workgroup was formed. The workgroup focused on nuisance lawsuits, and in April 2014 the subcommittee considered a resolution endorsing the ABA Model Transactional Tax Overpayment Act. The subcommittee referred the resolution back to staff for further drafting. The draft was approved by the committee. The draft was then referred to the MTC Resolution Committee, which referred it to the Commission. The Commission adopted the resolution in July 2015.

In the course of the workgroup's consideration of the issues involved in class action and false claims act cases with respect to state taxes, the group determined that there were situations in which states might benefit from whistleblower or false claims act processes for uncovering tax liabilities that would otherwise be difficult to identify. Staff reviewed potential solutions, and narrowed them to four options:

- (1) for the Commission to develop a model state tax whistleblower statute (the IRS model, IRC §7623);
- (2) for the Commission to develop a model state tax false claims act statute (the New York model);
- (3) for the Commission to develop both a model state tax whistleblower statute and a false claims act statute; or
- (4) to terminate the project.

At its May 7, 2015 meeting, the official guidance from the Executive Committee was to focus on the whistleblower portion at this time, in accordance with Option 1. The workgroup has proceeded to work on this issue but has gotten very little interest from the states.

- Possible Project on Federal Adjustments

The Uniformity Committee has been asked by industry and practitioners to consider model statutory language that might simplify the filing of state tax adjustments triggered by federal audit adjustments. The committee directed staff to consider the proposed project. Staff has reported that they have taken input from practitioners and reviewed the existing MTC model statute (which does not appear to have been adopted by any states). Staff is also consulting with the FTA standards group on whether the issue might be addressed, at least in part, by a technology change in electronic filing requirements allowing filing information that would allow certain adjustments to be made more simply.

- Possible Project on Partnership Issues

There are a number of developments in the partnership area that may warrant states' consideration of uniform rules. Some of these issues have been discussed in prior committee meetings, include meetings of the Litigation Committee. Others are the result of federal law changes with respect to the auditing of partnerships and the assessment of tax liabilities.